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## Rationality and Irrationality in the Ancient Greek Law of Procedure

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## RATIONALITY AND IRRATIONALITY IN THE ANCIENT GREEK LAW OF PROCEDURE

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Gerhard Thür\*

Scholarship is rational. Life is irrational and full of emotion. This paper,<sup>1</sup> dedicated to my friend Laurens, will be on rationality and irrationality in the ancient Greek law of procedure. When did the Greeks start deciding legal disputes in a rational way? What did judgements look like before that? After the publication of the masterly book by E.R. Dodds, the topic “the Greeks and the irrational” has boomed. Nevertheless, the legal aspect has been disregarded. The same may be said of the learned contributions on “rationality in Greek thought” in Frede/Striker (1996). In my opinion what is rational or irrational is largely in the eye of the beholder: what people at that time may have considered a completely rational type of adjudication, today seems irrational. Besides, those people might not always have been aware of the consequences of innovations that were introduced into the system.

I shall concentrate on Draco’s law on homicide dating back to 621-620 B.C.<sup>2</sup> It is the oldest known Greek statute on bloodshed and its prosecution. At the time of the general revision of laws in Athens in 409-408 B.C., it was copied from wooden blocks, *axones*,<sup>3</sup> onto a marble stele. This stele was found in the 1880s in a poor state of preservation. However, quotations from speeches made in Athenian courts of the fifth and fourth century B.C. allow a partial reconstruction, now edited in the *Inscriptiones Graecae* (IG I<sup>3</sup> 104).<sup>4</sup>

1 I present a slightly enlarged and modified version of a paper presented at the International Conference: *Ius est ars boni et aequi*, Southern African Society of Legal Historians, Pilanesberg 12-16 May 2013. I gratefully acknowledge some comments and suggestions made by Laurens, who discussed this topic with me several times and brought to my attention Dodds, E.R., *The Greeks and the Irrational* Berkeley, 1951, and Frede/Striker (eds.), *Rationality in Greek Thought* Oxford, 1996.

2 For more details see my forthcoming article “Prozesseide im Gesetz Drakons und ihr Nachleben im klassischen Athen” in: Barta (ed.), 6. *Innsbrucker Tagung ‘Lebend(ig)e Rechtsgeschichte’, Prozeßrecht und Eid: Recht und Rechtsfindung in antiken Kulturen – Verfahrensrecht als erstes Zivilisierungsprojekt – Zur Teleologie rechtlicher Verfahren*.

3 See Davis, Gil, “*Axones* and *Kurbeis*: A New Answer to an Old Problem” 2011 *Historia* 60: 1-35.

4 From 1981, based on Stroud, Ronald, *Drakon’s Law of Homicide* Berkeley, 1968: 5.

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My studies on Draco form part of research I have been doing since 1970 in the law of procedure in the archaic Greek polis.<sup>5</sup> In my view, Draco's law represents an intermediate stage: on the one hand, it is based on the ancient irrational tradition dating from a time when the outcome of litigation was not decided by court judgements, but rather by oaths imposed by the courts and sworn by the parties. On the other hand, in Draco's law we find formal voting by a panel of judges, which was the nucleus of rational decision-making in classical Athens. Scholars have not as yet grasped the great importance of Draco's step in the direction of rationality, a step that has influenced western legal culture up to the present day.

In archaic Greek poleis, purgatory oaths imposed by a law court were very well known. By simply swearing, the defendant could refute the plaintiff's claim. In my opinion, this was then the normal method of settling disputes.<sup>6</sup> Was this method rational or irrational? Today the answer has to be that it was highly irrational. The final verdict depended only on the defendant's fear of the gods he was invoking in the oath formula. If he perjured himself, he had to fear that the gods would subsequently punish him and perhaps all his offspring. Nevertheless, in archaic times when people generally did believe that the gods interfered directly in their lives, the method seemed to be a rational one: no defendant would risk a purgatory oath if he really were guilty. At least social control might discourage him.

The personal skill of archaic judges consisted in finding the correct divinities, competent to punish the culprit; and in formulating precisely the facts to which the defendant had to swear. For example, as a baby the god Hermes stole Helios' cows and hid them in a cave. He could easily have sworn a deciding oath "I did not hide them at home".<sup>7</sup> This would not have been a "straight" (*ithys*) oath but rather a "crooked" one (*scholios horkos*). Thus there was also a great deal of rationality in imposing the correct purgatory oath.

5 Thür, Gerhard, "Zum *dikazein* bei Homer" 1970 *ZRG RA* 87: 426-444; see also Thür, Gerhard, "Die Todesstrafe im Blutprozess Athens. Zum *dikazein* in *IG I<sup>3</sup>* 104; Dem. 23, 22; Aristot. AP 57, 4" 1990 *Journal of Juristic Papyrology* 20: 143-156; Thür, Gerhard, "Oaths and Dispute Settlement in Ancient Greek Law" in: Foxhall/Lewis (eds.), *Greek Law in its Political Setting. Justification not Justice* Oxford, 1996: 57-72; Thür, Gerhard, "Der Reinigungsseid im archaischen griechischen Rechtsstreit und seine Parallelen im Alten Orient" in: Rollinger/Barta/Lang (eds.), *Rechtsgeschichte und Interkulturalität* Wiesbaden, 2007: 179-195.

6 Thür (n. 5) 2007: 181-91 (and earlier); Sealey, Raphael, *The Justice of the Greeks* Ann Arbor, 1994: 92, 101, 119; Carawan, Edwin, *Rhetoric and the Law of Draco* Oxford, 1998: 57; Schmitz, Winfried, "'Drakonische Strafen.' Die Revision der Gesetze Drakons durch Solon und die Blutrache in Athen" 2001 *Klio* 83: 7-38 at 27; Sommerstein, Alan H./Bayliss, Andrew J., *Oath and State in Ancient Greece* Berlin/Boston, 2013: 61, 115; pace e.g. Talamanca, Mario, "'*Dikazein*' e '*krinein*' nelle testimonianze greche più antiche" in: Biscardi (ed.), *Symposion 1974* Köln, 1979: 103-133 at 106-117; Gagarin, Michael, "Oaths and Oath-Challenges in Greek Law" in: Thür/Vélissaropoulos-Karakostas (eds.), *Symposion 1995* Köln, 1997: 125-134 at 131-133; Cantarella, Eva, "Modelli giurisdizionali omerici: il giudice unico, la giustizia dei vecchi" in: Cantarella/Thür (eds.), *Symposion 1997* Köln, 2001: 3-19 at 13 (= *Diritto e società in Grecia e Roma* Milano, 2011: 151-169 at 163); Cantarella, Eva "Dispute Settlement in Homer: Once Again on the Shield of Achilles" in: *Mélanges en l'honneur P.D. Dimakis* Athens, 2002: 147-165 at 159 (= *Diritto e società*, see above, 2011: 171-191 at 183); Westbrook, Raymond, "The Trial Scene in the Iliad" 1992 *Harvard Studies in Classical Philology* 94: 53-76 (= *Law from the Tigris to the Tiber I*. Winoma Lake, IN., 2009: 303-327) is less interested in procedure.

7 *Homeric Hymns* 4.378-396.

I shall base my interpretation of Draco's law on these assumptions. There is only one problem: the law does not mention oaths at all. However, conclusions from later periods will help. I shall focus on lines 11-13. Before dealing with this text, I shall discuss the reason for Draco's legislation and the strange beginning with the use of the word *καί* (and/even) in line 11.

### 1. Why did Draco enact his law on homicide?

Did he intend, as is generally believed, to codify the homicide law of his time<sup>8</sup> or did he respond – albeit in a quite general way – to real problems in Athenian society? I hold the second view.<sup>9</sup> The law was a response to an actual historical situation.

Let us have a look at the beginning of the first *axón*.<sup>10</sup> I translate the preserved text with all its possible variations: “And when (or: even if) someone kills another without intention, he is exiled (or: he shall stand trial). The *basileis* (“kings,” or at any rate magistrates) are to *dikazein* (for the moment I shall not translate this word) responsible for homicide ... (now, according to the *stoichedon* order of the inscription there is a gap of exactly seventeen letters) ... the person who was planning (conspiring or, preferably, advising, *bouleuein*). The *ephetai* (a board of fifty-one dignitaries, not magistrates) are to *diagnonai* (again not translated).” The following text deals with the private pardoning of the killer (*aidesis*) by the victim's relatives after they have accepted blood money (*poine*). Provisions follow, regulating by what degree of kinship someone must be related to the victim in order to be entitled to file a private law suit, a *dike phonou*. In classical Athens, homicide was still a private matter, there being no public prosecution.<sup>11</sup>

From speeches made in Athenian courts,<sup>12</sup> we know that in the lacuna in line 12, the alternative to *bouleuein*, however we translate it, must have been “killing by one's own hand.” Since the publication of the work of Hans Julius Wolff on the subject, this has been

8 Recently Gagarin, Michael, *Writing Greek Law* Cambridge, 2008: 93-109, discussing earlier literature.

9 Thür, Gerhard, “Gesetzeskodizes im archaischen und klassischen Athen” in: *Mélanges en l'honneur P.D. Dimakis* (n. 6): 631-640, following Humphreys, Sally, “A Historical Approach to Drakon's Law of Homicide” in: Gagarin (ed.), *Symposion 1990* Köln, 1991: 17-45.

10 *IG I<sup>3</sup> 104*, 10-13: *πρῶτος ἄχσον· | καὶ ἐὰμ μὲ ἕκ [π]ρονοίας [κ]τ[ένει τις τινα, φεύγ]ε[ν· δ]ι[κ]άζεν δὲ τὸς βασιλέας αἰτίο[ν] φό[νο] E ... 17 ... E [β]ολ[ε]ύσαντα· τὸς δὲ ἐφέτας διαγν[δ]να[ι]. [αἰδέσασθαι δ' ---*

11 MacDowell, Douglas M., *Athenian Homicide Law in the Age of the Orators* Manchester, 1963: 8-32.

12 Ant. 6.16: Μεμαρτύρεται μὲν οὖν ὃ ἄνδρες περὶ τοῦ πράγματος ἃ ἐγὼ ὑμῖν ὑπεσχόμην. ἐξ αὐτῶν δὲ τούτων χρῆ σκοπεῖν ἃ τε οὗτοι διωμόσαντο καὶ ἃ ἐγώ, πότεροι ἀληθέστερα καὶ εὐορκότερα. διωμόσαντο δὲ οὗτοι μὲν ἀποκτεῖναι με Διόδοτον βουλεύσαντα τὸν θάνατον, ἐγὼ δὲ μὴ ἀποκτεῖναι, μήτε χειρὶ ἐργασάμενος (Dobree: ἀράμενος mss.) μήτε βουλεύσας. (17) αἰτιῶνται δὲ οὗτοι ... (You have heard the witnesses testify to the facts, gentlemen, as I promised you. From these you must examine what each side swore and decide which of us was more truthful and swore more correctly. They swore that I killed Diodotos by planning his death, but I swore I did not kill him either by my own hand nor by planning ... (Transl. Gagarin in Gagarin, Michael/MacDowell, Douglas M., *Antiphon and Andocides* Austin TX, 1998, but see below n. 35)) and Andoc. 1.94: καίτοι οὗτος ὁ νόμος καὶ πρότερον ἦν ... τὸν βουλεύσαντα ἐν τῷ αὐτῷ ἐνέχεσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον. (And the following law not only existed in the past ... “One who has planned an act shall be liable to the same penalty as one who committed it with his own hand.” (Transl. MacDowell in Gagarin/MacDowell, above)).

beyond dispute,<sup>13</sup> but it is still not certain what the exact words were that supplemented the seventeen missing letters. *Bouleuein* was an indirect way of killing, committed with and – as we shall see – without the intention of killing.

This introduction was necessary in order to provide an explanation of Draco's reasoning. Can a legislator, who wants to codify homicide law, begin his law code with "and"? And, moreover, would he start with unintentional killing? Scholars supporting the codification thesis have a possible explanation: Draco's original law was amended; when the law was rewritten on stone in 409-408 B.C., it was no longer the *ephetai* who had to adjudge intentional homicide, but rather the council of the Areopagus. The original beginning of Draco's text was therefore omitted when the stone inscription was made. The word *καί* (and) was copied by mistake.<sup>14</sup> Ruschenbusch even reconstructed the wording of the supposedly cancelled beginning of the assumed "law code"<sup>15</sup> – in vain, I think.

Stroud, on the other hand, holds that intentional killing was regulated in a later *axon* no longer legible on the stone; one cannot impute modern systematic thinking to an archaic lawgiver. Hence he translates *καί* as "even if," a possible beginning of a law.<sup>16</sup> Gagarin follows this translation, but disagrees with Stroud's systematic order. He thinks that intentional killing was not regulated in a later *axon* but rather "implicitly" – with the same consequences as unintentional killing.<sup>17</sup> Neither author is fully convincing.

For my part, I follow the opposite view: for a century, some scholars have connected the alleged codification with a certain historical event, the sacrilege against the Cylonians, probably committed in the year 636 B.C., one generation before Draco.<sup>18</sup> I think one can explain the strange composition of Draco's law as a response to this specific historical event.<sup>19</sup>

We have only legendary reports of the Cylonian sacrilege in Herodotus (5.71), Thucydides (1.126.11) and Plutarchus (Solon 12.1-3). It was also mentioned in Pausanias 1.28.1. To sum up, Cylon (Kylon), an aristocrat who had been victorious in the Olympics, set out to rule Athens as a tyrant. After consulting the Delphic oracle and receiving the usual ambiguous response, he, together with a few accomplices, occupied the castle on the Acropolis. His adversaries incited the masses, besieged the Acropolis, and starved out the insurgents. Cylon escaped but in the meantime, his men were dying of hunger in the temple of Athena Polias. Their death there would have meant that the sanctuary would be desecrated. Therefore, the Athenian archons under the Alcmaeonid Megacles (or some

13 Wolff, Hans Julius, "Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen" in: Idem (ed.) *Beiträge zur Rechtsgeschichte Altgriechenlands und des hellenistisch-römischen Ägypten* Weimar, 1961: 1-90 at 67-70 (Engl.: 1946 *Traditio* 4: 31-85 at 71-73).

14 Literature quoted in Thür (n. 5) 1990: 145; differently Westbrook, Raymond, "Drakon's Homicide Law" in: Harris/Thür (eds.), *Symposion 2007* Wien, 2008: 3-16.

15 Ruschenbusch, Eberhard, *Solon: Das Gesetzeswerk – Fragmente. Übersetzung und Kommentar* Stuttgart, 2010: 33: "[Wenn jemand vorsätzlich einen anderen tötet, kann man mit ihm verfahren, wie man will, sein Besitz aber soll schutzlos sein,] und wenn jemand jemanden unvorsätzlich tötet ... ."

16 Stroud (n. 4) 1968: 34-40.

17 Gagarin, Michael, *Drakon and Early Athenian Homicide Law* New Haven/London, 1981: 98-102.

18 Humphreys (n. 9) 1991: 41-45; Thür (n. 9) 2002 (and forthcoming, see n. 2) with further references.

19 Thür (n. 9) 2002.

such name) promised the rebels safe conduct to leave the country. The failing insurgents knotted a woollen thread to the statue of the goddess and under her magic protection “roped” down their way from the castle. Unfortunately and significantly, at the shrine of the Erinyes the thread broke. Because the goddess had withdrawn her protective hand, Megacles ordered that the supplicants be seized and put to trial. However, before this could happen the crowd stoned the Cylonians, some of whom were even slaughtered at the altars. After that, Athens fell into a crisis of blood feuds between aristocratic families, which ended only under Draco’s regime.

I see the connection between the sacrilege against the Cylonians and Draco’s law in the strange beginning of the text. It seems to fit the historical situation exactly. Firstly, unintentional killing (μὲν κ [π]ρονοία): Megacles and his fellow-archons could assert, when they had ordered the seizure of the rebels, they had not intended that they be killed. Draco’s answer was: even if you killed unintentionally, you will be exiled. At that time exile was the only consequence of killing a person. Secondly, indirect killing ([β] ολέυσαντα): the archons could assert further that they had not killed because they didn’t act “with their own hands”. Draco answered: even those who gave the order or “advised” a measure resulting in the death of the rebels, are responsible for the homicide.

One generation after the sacrilege, Draco, through his statute, enabled the law courts to exile the main culprits in the long lasting crisis and pardon the minor culprits. One may trace the strange order in which unintentional indirect killing received precedence in a law on homicide to the political situation at that time. No legislator, drawing up an abstract law code, would invent such a case.

One can explain also the following paragraphs in the light of the historical situation. Draco enumerated the group of relatives competent to pardon the killer, which was necessary to pacify the polis. Because blood feuds had even led to the extinction of some families, Draco ordered that ten men chosen from the victim’s *phratría* (members of the broader family cult) could pardon (grant *aidesis* to) a culprit when there were no other more competent relatives, but only if the culprit had killed unintentionally (*akon*, ll. 16-9). This was the only reference to unintentional killing. Generally, the same sanction was imposed for both intentional and unintentional killing: exile.<sup>20</sup> Later, Solon introduced the death penalty for intentional killing and also permitted the Areopagus, instead of the *ephetai*, to judge certain murder cases.<sup>21</sup>

## 2. Homicide trials and oaths

Dealing with the oaths, admittedly not mentioned in the text, means having to restore the seventeen missing letters in line 12.

Firstly, however, two textual problems must quickly be solved. In line 11, *pheugein* can only mean “to be exiled”, not “to stand trial” as Phillips and Pepe recently held.<sup>22</sup>

20 Gagarin (n. 17) 1981: 101.

21 Thür (n. 5) 1990.

22 Phillips, David D., *Avengers of Blood. Homicide in Athenian Law and Custom from Draco to Demosthenes* Stuttgart, 2008: 50-51 with 74; and Pepe, Laura, *Phonos. L'omicidio da Draconte all'età degli oratori* Milano, 2012: 22-28.

Normally, a man accused of killing sought shelter from the relatives' legitimate blood revenge in a sanctuary. There he could either deny having committed the act and stand trial, or confess and take the safe path into exile.<sup>23</sup> Abroad, he was safe from any persecution (ll. 26-29). Draco's first sentence is therefore a substantive, not a procedural rule.

The third sentence can also be explained easily (l. 13): τὸς δὲ ἐφέτας διαγν[ὸ]να[ι]. In lines 18-19 the *ephetai* are also called the "Fifty-one." In classical Athens, apart from the Areopagus, a board of fifty-one citizens still decided homicide cases.<sup>24</sup> The odd figure of fifty-one proves that from Draco's time onwards, *diagnonai* meant "deciding by votes." Because blood revenge was then legitimate, one can be sure that the *ephetai* voted secretly to avoid revenge that the culprit's relatives might take. The vote was "guilty" or "not guilty" regarding the alternative claims "killing with one's own hand" or "by advising" expressed in the second sentence (l. 12). Only in the rare cases where a killer was pardoned, not sentenced, did the *ephetai* vote on whether the killing was "unintentional" or "intentional".<sup>25</sup>

Now we come to the crucial question: what is the *dikazein* of the *basileis* of lines 11-12? The persons making up the *basileis* are quite clear; not so the act of *dikazein*.

In classical Athens the nearest relative of a victim filed a private *dike phonou* with the *archon basileus* (the "king" archont), one of the nine highest magistrates. His province was sacred affairs, including lawsuits concerning bloodshed. Depending on the category into which the deed fell, the *basileus* passed the claim on to the court of the *ephetai*, sitting at different sanctuaries, or to the Areopagus.<sup>26</sup> Before the trial, the plaintiff and the defendant as well as their witnesses had to swear the "greatest and strongest" most reverend oath, the *diomosia* (Ant. 5.11, Dem. 23.67-68).<sup>27</sup> In Draco's time, the *basileis* were magistrates. Stroud explained the plural as referring to the annual change of magistrates.<sup>28</sup> The better view is that the plural comprises the *archon basileus* of the polis together with the four *phylobasileis* of the old Attic *phylai*, who in classical Athens still had an inferior role in cases of bloodshed.<sup>29</sup>

What was the *dikazein* done by these five *basileis*? In the huge literature about Draco, there is no satisfying answer. One must not transfer the terminology of classical Athenian procedure into archaic times. Later, *dikazein* and *gignoskein* were synonyms, both meaning the law courts' "deciding." However, in Draco's law the court of the *ephetai* was deciding by *dignonai*. Therefore, the *basileis* cannot do the same thing. With some juristic plausibility, Wolff holds that *dikazein* means "pronouncing" the verdict rendered

23 This topic is discussed by Schmitz (n. 6) 2001: 25-26.

24 MacDowell (n. 11) 1963: 56; Harrison, A.R.W., *The Law of Athens II: Procedure* Oxford, 1971: 39-42; concerning Draco, see Carawan (n. 6) 1998: 71.

25 Pace Ruschenbusch (n. 15) 2010: 19; Carawan (n. 6) 1998: 70, 81; Pepe (n. 22) 2012: 77.

26 MacDowell (n. 11) 1963: 37-38.

27 Sommerstein/Bayliss (n. 6) 2013: 113-115.

28 Stroud (n. 4) 1968: 47.

29 Pepe (n. 22) 2012: 32-33 with further references.

by the *ephetai*.<sup>30</sup> But why is Draco speaking first of pronouncing and then of rendering the sentence? And were five magistrates necessary just for pronouncing a verdict?

I also cannot agree with Ruschenbusch, who thinks that in every homicide trial firstly the *basileis* decided what the facts were (*dikazein*): in other words, whether the defendant had killed or not; and that then the *ephetai* voted on the question of subjective intention (*diagnonai*).<sup>31</sup> However, voting about intention was exceptional and foreseen only in the rare cases of pardoning by the members of the *phratría*.

In my opinion my late German colleagues were wrong, but their opinions at least made sense. I have a notion that some of our contemporary American colleagues do not pay much attention to the juristic problems. In 1981 Gagarin (at xv-xvi) seemed to follow Wolff: “judge the case” of the *ephetai* is contrasted with “adjudge responsible” of the *basileis*, which probably means “pronounce.” In his book published in 2008 (at 96) I see no differentiation from the legal point of view between “judge guilty” (*dikazein*) and “decide” (*diagnonai*).<sup>32</sup>

To my mind, *dikazein* must be seen in a completely different way. It belongs to the “introductory step” of the trial.<sup>33</sup> With reference to my studies on legal procedure in Homeric times, I compare Draco’s *dikazein* of the seventh century with the “conditional verdict” delivered in other archaic Greek societies. In both the Homeric trial scenes, on the shield of Achilles (Il. 18.497-508) and after the chariot race (Il. 23.579-585), the court – the *gerontes* or the *hegemones* – did not pronounce on guilt, but rather formulated purgatory oaths. It was then up to the defendant to get acquitted by swearing the oath imposed on him, or to confess his guilt when he did not dare perjure himself.<sup>34</sup>

This model may help explaining the *dikazein* in Draco’s archaic law. Indeed, in Athenian homicide trials in classical times oaths were sworn, the *diomosiai* previously mentioned.<sup>35</sup> The defendant was no longer allowed to swear a decisive purgatory oath, but both the plaintiff and defendant and their witnesses had to affirm through the most horrible oaths whether the defendant had killed or not. These oaths were taken in court and also before the magistrate, the *basileus*, during the preparatory, pre-trial sessions called *prodikasiai*. In other private lawsuits, these sessions were called *anakripsis*. Already the word *prodikasia* suggests the *dikazein* of Draco’s *basileis*.

Antiphon’s sixth speech, *on the Choreutes*, from 419 B.C., makes matters abundantly clear. In those times the *diomosiai* were still formulated according to the ancient Draconic law, and we find the restoration of line 12 of the inscription. The leader of a choir, a *choregos*, had had to train a boys’ choir for a festival. His agent administered a dangerous *pharmakon* to one of the boys, the *choreutes* Diodotus, to improve his voice. The boy died. Like Megacles, mentioned above, the *choregos* was charged with *bouleuein*, advising, without intending to kill. From the wording of the *diomosiai* quoted in section 16, one may draw conclusions on the lost wording of the second sentence in

30 Wolff (n. 13) 1961: 74 (1946: 75); Talamanca (n. 6) 1979: 130 agreed.

31 Ruschenbusch (n. 15) 2010: 19.

32 In the same way Phillips (n. 22) 2008: 49-50.

33 Suggested also by Cantarella, Eva, *Studi sull’omicidio in diritto greco e romano* Milano, 1976: 90-91.

34 For references, see above n. 6.

35 See above n. 27.



Draco's law, the alternative to *bouleuein*: "You have heard the witnesses testify to the facts, gentlemen, as I promised you. From these you must examine what each side swore and decide which of us swore more truthfully and more purely. They swore that I killed Diodotos by advising (the cause for) his death, but I swore I did not kill him either by my own hand or by advising."<sup>36</sup>

The plaintiff swore that the accused *choregos* had killed Diodotus by advising, *bouleuein*. The *choregos* denied each alternative: I did not kill him either with my own hand or in an indirect way. These were precisely the alternatives covered in l.12 of Draco's law. To find the supplement to the lacuna I think we need the verb εἶναι proposed by Ruschenbusch and Gagarin: αἴτιο[ν] φύγ[ο] εἶναι. Then, I think, further supplementing τὸν ἐργασάμενον (Gagarin 1981: xv) is odd, because ... ]E [β]ολ|εύσαντα is without an article too. Up to now Ruschenbusch's supplement has seemed the best,<sup>37</sup> but I would suggest a better word for αὐτόχερ, "with one's own hands." When we look closely at the Antiphon editions we find that χειρὶ ἐργασάμενος (Dobree: ἀράμενος mss.) is a conjecture. Most editors of the Antiphon speeches were not able to explain the word ἀράμενος (to raise, lift) with an indirect object χειρὶ. They corrected it to ἐργασάμενος according to Andocides 1.94<sup>38</sup> who quoted another, more recent statute. For Antiphon 6, Wilamowitz stayed with ἀράμενος translating "I did not kill him with my hand, having raised it".<sup>39</sup> Staying with Antiphon's words, not with his syntax, we also have the supplement of line 12: δ|ικάζεν δὲ τὸς βασιλέας αἴτιο[ν] φύγ[ο] εἶναι ἔχειρα ἀράμενον] ἔ [β]ολ|εύσαντα.<sup>40</sup> In translation (and interpretation): "The *basileis* are to order (the plaintiffs to swear): 'he (the relevant defendant) is responsible for killing' (now the alternative follows) either 'having raised the hand (himself)' or 'having advised (the cause for ones death)'." This statute, enacted for the special case of the slaughter against the Cylonians, continued to be the basic provision about bloodshed in Athens until classical times.

In this interpretation, *dikazein* must be understood in its archaic sense: imposing an oath. However, Draco did not impose only one oath, and the verdict was not a conditional one. Rather we may assume that the verdict was delivered by the votes of the *ephetai*,

36 Text quoted above in n. 12; I changed some crucial terms in Gagarin's translation.

37 Ruschenbusch (n. 15) 2010: 30: αἴτιο[ν] φύγ[ο] εἶναι εἴτε αὐτόχερ εἴτε]ε [β]ολ|εύσαντα.

38 Quoted above in n. 12.

39 Von Wilamowitz-Moellendorff, Ulrich, "Die sechste Rede des Antiphon" in: *SB AkW Berlin* Berlin, 1900: 398-416 at 401 n. 1 = *Kleine Schriften* III, Berlin, 1969: 196-217 at 199) following Vahlen, Johannes, "Prooimium indice lectionum aestivarum 1879 praemissum" Berlin, 1879: 10 *non vidi* (= *Opuscula Academica* I, Berlin, 1907, repr. Hildesheim, 1967: 77-87 at 85), who quoted the parallel Ant. 5.92: χειρὶ ἀποκτείνη.

40 First suggested by Thür (n. 5) 1990: 152 (restoring χειρὶ; in n. 42 the writing χειρ- is explained), consenting Méléze Modrzejewski, Joseph, "La sanction de l'homicide en droit grec et hellénistique" in: Gagarin (ed.), *Symposion 1990* Köln, 1991: 3-16 at 7 (= *Droit et justice dans le monde grec et hellénistique* Warsaw, 2011: 211-231 at 218). After discussions at the Institute for Advanced Study in Princeton NJ in March 2014 I think Draco, in a more simple language, wrote the direct object χειρὰ as e.g. used in Arist. *Rhet.* 1374a35: ἐὰν ἐπάρηται τὴν χειρὰ ἢ πατάξῃ and still found in a "confession inscription" of Asia Minor, Petzl, Georg, *Epigr. Anatol.* 22, 1994, no. 44: ἐπιδὴ ἀράμ[ενος] τὰς χεῖρας. I thank my colleagues Angelos Chaniotis, Christopher Jones and Emmanuel Voutiras for a helpful discussion.

which from Draco's times onwards determined which side swore "more truthfully and more purely", as Antiphon characterized the method about 200 years later.

### 3. Rationality

Draco's *dikazein* is rooted in the archaic way of settling disputes by purgatory oaths, which we would call irrational. However, imposing a double oath and having a panel of judges decide which one to believe, points to future rational adjudication.<sup>41</sup> Eventually the art of rhetoric gave the parties more and more opportunity to use rational arguments and convince the judges of their case. Even today, the part played by Greek practical legal thinking in promoting rational court sentences, which still form part of our legal culture, has not been acknowledged.

Nevertheless, I do not overrate Draco's rationality. From the archaic point of view, the double oath method could be explained as follows: one did not wait for the person who had sworn a false purgatory oath to be punished by the offended god. Rather, in a type of ordeal, one let the god himself speak through the judges' votes on the double oath. One of the oaths had to be false. Technically speaking, by doubling the oath Draco deprived it of its decisive force; by adding a decisive "ordeal" he amazingly raised the sentence to a more objective, rational level. This simple and still irrational procedural method was the origin of what we term rational adjudication in Greece.

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### Abstract

The paper deals with what today we would call rational and irrational procedural methods in Greek adjudication in archaic times. In Draco's law of homicide dating back to 621-620 B.C., I see the first known move from deciding the outcome of a case by imposing purgatory oaths towards voting by a panel of judges. Although deciding on the proper wording of a purgatory oath demanded a great deal of legal experience on the part of the state authorities, the outcome of the trial depended on the irrational decision of the culprit himself to brave the wrath of the gods if he committed perjury. In Draco's law we find, firstly, the method of imposing contrary oaths (*diomosiai*) on each litigant (which explains the *dikazein* of the officials, the *basileis*). It was therefore not the oaths that were decisive, but the vote of the fifty-one *ephetai* who decided which oath was the better one. The party who won the case was the one best able to persuade the judges, and in this way, reasoning achieved a new level. This was the origin of the more rational classical Athenian procedural law. In this sense, I restored the text in the much disputed lacuna in *IG I<sup>3</sup> 104.12* from the *diomosiai* mentioned in *Ant. 6.16*.

41 For a different explanation see Berneker, Erich, "Der Ursprung des doppelten Parteieides im altgriechischen Verfahrensrecht" in: *Syntelesia Vincenzo Arangio Ruiz* Napoli, 1964: 743-749.